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No. 87-1969

Supreme Court, U.S.

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IN THE

# Supreme Court of the United States

October Term, 1987

THE BOROUGH OF BERWICK, DANIEL DEFINNIS, SR.,  
THOMAS METZ, CARMEN BUTERA, and  
HERMAN DAVIDSON, Members of the Zoning  
Hearing Board of the Borough of Berwick,

*Petitioners,*

vs.

GLEN M. NEIDERHISER and GREGORY C. BROWN,  
t/a PROGRESSIVE ENTERPRISES,  
t/a HOLLYWOOD STEREO AND VIDEO,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

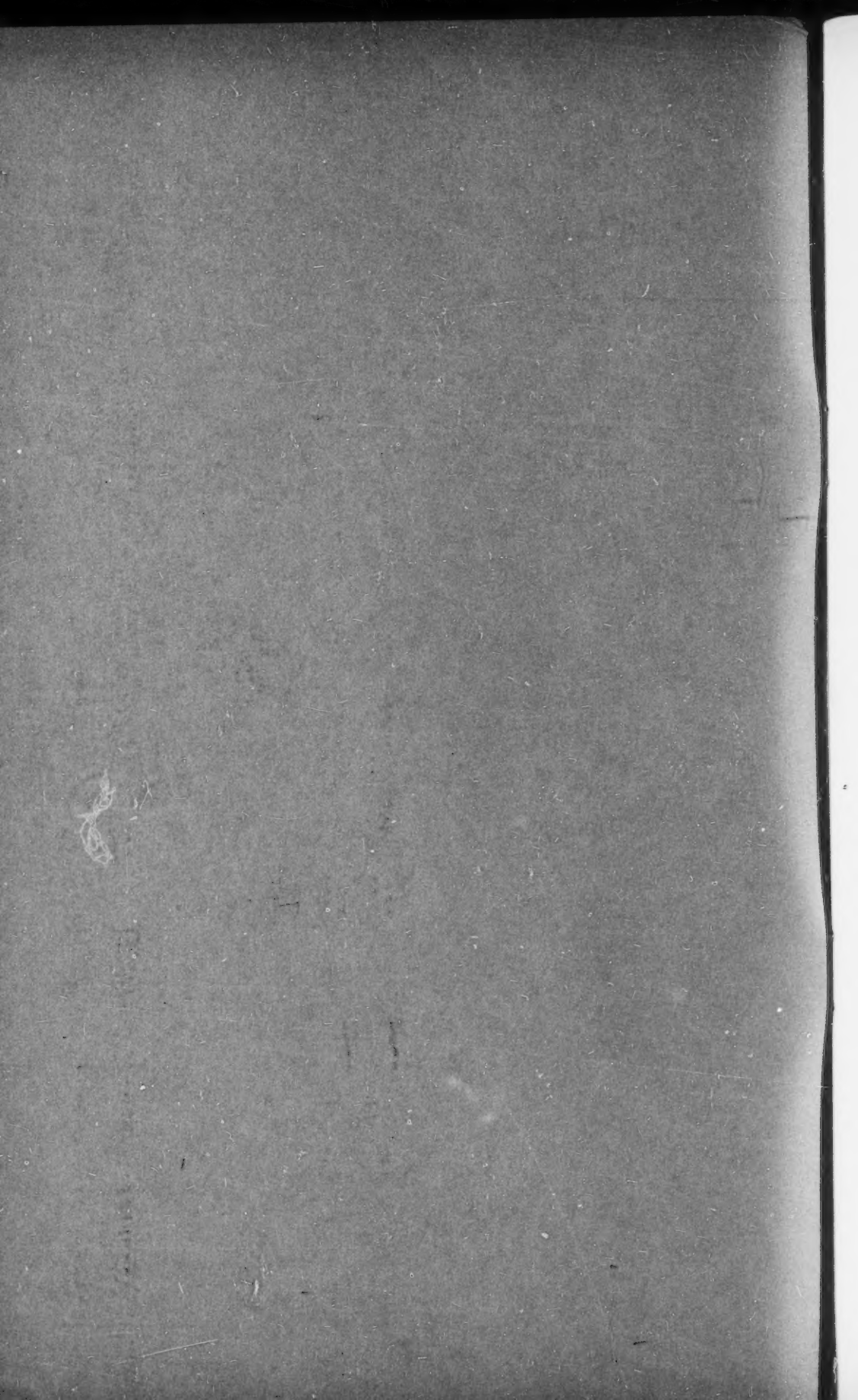
## BRIEF FOR RESPONDENTS

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i.

**Questions Presented for Review**

1. Whether the issues raised in the Petition for Writ of Certiorari were not considered by the courts below on their merits?

2. Whether the issues raised in the Petition for Writ of Certiorari were not raised in the courts below?

3. Whether it may not be necessary for the Supreme Court to reach the constitutional issues presented by the Petitioner?

4. Whether the unusual procedural posture of this case makes it inappropriate for the Supreme Court to grant a Writ of Certiorari?

5. Whether the case or controversy issue is not before the Supreme Court because it was not raised in Berwick's Petition for Writ of Certiorari?

6. Whether there exists no actual conflict between the Circuit Courts of Appeal?

7. Whether any important question of federal law has already been resolved by the Supreme Court of the United States and was followed by the Third Circuit Court of Appeals in the present case?



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THE BOROUGH OF BERWICK, DANIEL DEFINNIS,  
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**BRIEF FOR RESPONDENTS**

**Counterstatement of the Case**

**Factual Background**

On July 25, 1986, Hollywood Stereo and Video applied to the Zoning Hearing Board of the Borough of Berwick to secure a special exception to change the use of the

property it was renting from a pizza parlor to a home video rental store. Under Section 100-85 of the Berwick Zoning Ordinance (Petitioner's Appendix Pg. 41a) a pre-existing, non-conforming use can be changed as long as there is less than a 35 percent increase in area and as long as no additional dimensional nonconformities are created by the change. There was no dispute before the Zoning Board that the structure had pre-existing, non-conforming use status for commercial use; that the size of the structure would remain the same; and that no new dimensional nonconformities would be created. Despite meeting the objective criteria in the Zoning Ordinance for changing from one pre-existing, non-conforming use to another, the Berwick Zoning Hearing Board rejected Hollywood's application for special exception.

A review of the transcript (Respondent's Appendix Pgs. 1a-12a) indicates that a representative of Hollywood indicated that a portion of the video tape rentals would be adult or X-rated movies sold under controlled circumstances in a separate section of the store (Respondent's Appendix Pg. 2a). The following exchange took place before the Zoning Hearing Board when the special exception was denied:

"CARMEN BUTERA: In these videos that you are going to have, are they going to be rated or just family?

GREG BROWN: We carry all types of movies from childrens to adult entertainment.

CARMEN BUTERA: When you say adult, I don't want to sound facetious, is it going to have porno, hardcore?

GREG BROWN: There are X-rated movies, yes." (Respondent's Appendix Pgs. 1a-2a).

"DAN DEFINNIS: Greg, I want to be honest with you because you are a nice guy and I know you all my life, I am not in favor of the porno that goes with this store. If you were just selling movies, yes, I would say I want it, my principal is, I don't go for that and I can't deviate from what I believe in, I have nothing against you personally.

GREG BROWN: I understand that.

DAN DEFINNIS: What you are selling, I can't go for it.

GREG BROWN: There is all types of people out there in the world today, some people enjoy this and other don't. Some people enjoy comedy, horror movies, we give the selection for what they want, just as the other video stores do in town.

DAN DEFINNIS: I haven't voted for any other stores. We already had one come in and I voted against it in a residential area. It is not that I am picking on you, but this is my principal. I am not going any further." (Respondent's Appendix Pgs. 2a-3a).

"CARMEN BUTERA: I would like to ask you a question. Do you think the X-rated movies versus the family, what do you think the percentage of business it would bring you.

GREG BROWN: Biggest percentage of business would be the childrens and the normal movies, approximately 10 to 15 percent would be the other portion.

CARMEN BUTERA: Do you think the loss of that ten percent would create a financial hardship that would make this venture impractical?

GREG BROWN: It would definitely make a difference in the amount of business we do, yes.

CARMEN BUTERA: Would it alter your future of entering into the business or not?

GREG BROWN: I would like to discuss that with my partner, but personally, I think it would, yes.

CARMEN BUTERA: Any other questions?

DAN DEFINNIS: I would definitely be in favor if it is strictly eliminated, I would be in favor." (Respondent's Appendix Pgs. 7a-8a).

"CARMEN BUTERA: The change of use Mr. Brown, would not hinder in my opinion, but having the porno movies, I have to worry whether it would offend the town people, so we would like to check to see whether there is indeed a restriction how far away from church and school and then give you findings." (Respondent's Appendix Pg. 9a).

"GREG BROWN: Would it be considered if we decided not to have the X-rated movies?

CARMEN BUTERA: Oh yes, of course, I can't comment on that at this position." (Respondent's Appendix Pg. 12a).

Dissatisfied with the Zoning Board's decision, Hollywood appealed under Pennsylvania's Municipalities Planning Code, 53 P.S. 10101 *et seq.*, to the Court of Common Pleas of Columbia County, Pennsylvania. While the zoning appeal was pending Berwick and Hollywood attempted to resolve the matter by stipulating to the issuance of the special exception. The settlement agreement, at Paragraph No. 8 (Respondent's Appendix Pg. 14a), required compliance by Hollywood with Berwick's Obscenity Ordinance No. 1158 (Petitioner's Appendix Pg. 67a). Paragraph No. 8 stated:

"The Appellant shall comply with the Borough of Berwick Ordinance No. 1158 with respect to pornography and will not operate and maintain the premises as an Adult Book Shop or Adult Firm [sic] Viewing Premises."

Hollywood refused to execute the agreement because it believed that Ordinance No. 1158 was unconstitutional. In the meantime, on April 22, 1987, the Court of Common Pleas of Columbia County reversed the decision of the Zoning Hearing Board because the Board had not made findings of fact and conclusions of law, and remanded the matter for further proceedings. On May 13, 1987, the Zoning Hearing Board granted the special exception, and Hollywood opened for business in June, 1987.

After settlement negotiations broke down Hollywood filed an action under 42 U.S.C. 1983 in the United States District for the Middle District of Pennsylvania. The complaint (Respondent's Appendix Pgs. 16a-22a) consisted of three counts:

1. A declaratory judgment action seeking to declare the Borough of Berwick's obscenity ordinance unconstitutional and to enjoin its enforcement (Paragraph No. 16, Respondent's Appendix Pg. 20a).

2. An injunctive action seeking to restrain the enforcement of Ordinance 1158 on equal protection grounds<sup>1</sup> (Paragraph No. 18, Respondent's Appendix Pg. 21a).

3. A cause of action for money damages relating to the denial of the zoning permit for first amendment and due process reasons (Paragraph No. 19, Respondent's Appendix Pg. 21a).

Berwick did not challenge the sufficiency of the recitation of the causes of action in the complaint under F.R.C.P. 12(b)(6), and filed a responsive pleading. On April 15, 1987, Hollywood filed a motion for summary

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<sup>1</sup> The second cause of action based on Equal Protection was not pursued by Hollywood.



judgment relating only to the causes of action dealing with the unconstitutionality of Ordinance No. 1158. The Borough of Berwick filed no cross motion for summary judgment, but raised in its reply brief an alleged lack of case or controversy. The district court, without prior notice to the parties and without a complete factual record addressing the case or controversy issue, dismissed not only the count relating to Ordinance 1158, but the complaint in its entirety,<sup>2</sup> including the damage count which was not before the district court for consideration.

The Third Circuit Court of Appeals found that a case or controversy existed with respect to the cause of action relating to the unconstitutionality of Ordinance No. 1158 because of the attempt by the Borough of Berwick to condition the issuance of the zoning permit upon compliance with the ordinance (Opinion of Third Circuit—Petitioner's Appendix Pg. 4a). The Third Circuit also found that a case or controversy existed with respect to the claim for damages resulting from the delay in opening its business because the complaint alleged that the special exception was denied because of the content of the video tapes and not on zoning grounds, in violation of the freedom of speech clause of the first amendment and the due process clause of the fourteenth amendment (Opinion of the Third Circuit, Petitioner's Appendix Pg. 4a).

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<sup>2</sup> The Third Circuit found this procedure improper but nevertheless addressed the case or controversy issue on the merits (Petitioner's Appendix Pg. 9a).



## DISCUSSION

### 1. The Issues Raised in the Petition for Writ of Certiorari Were Not Considered by the Courts Below on Their Merits.

The decision on the merits by the Third Circuit Court of Appeals deals only with the case or controversy issue (Petitioner's Appendix Pg. 16a). Because the sufficiency of the cause of action was not raised by the Borough of Berwick, neither the Third Circuit Court of Appeals nor the district court ruled on the merits of the sufficiency of the cause of action. The Supreme Court will not consider the merits of a claim upon which the court of appeals, in view of its disposition of the case, did not pass. *Calmar S. S. Corp. v. United States*, 345 U.S. 446, 73 S.Ct. 733, 97 L.Ed. 1140 (1953). Accordingly, since the matters raised by the Borough of Berwick in its Petition for Writ of Certiorari were not passed on or decided by the courts below, the Petition for Writ of Certiorari should be denied.

### 2. The Issues Raised in the Petition for Writ of Certiorari Were Not Raised in the Courts Below.

In its Petition for Writ of Certiorari the Borough of Berwick argues, for the first time, the insufficiency of the allegations of the cause of action and that the district court should have abstained.

The Defendant Borough of Berwick did not file a motion pursuant to F.R.C.P. No. 12(b)(6) challenging the cause of action, and did not file a motion for summary judgment pursuant to F.R.C.P. No. 56 after facts were developed through discovery. For the first time Berwick alleges that abstention would have been appropriate in this case, after failing to request the district court to abstain. Because these issues were not raised in the courts below, they should not form the basis for granting the Borough of Berwick's Petition for Writ of Certiorari.

In addition, it should be clear from the record before this Court that the doctrine of abstention would not have applied to the facts of this case even if the issue had been raised in the courts below. There was no pending criminal action brought by the Borough under Ordinance No. 1158 which would require the federal court to have abstained as required by *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971) and *Pennzoil Companies v. Texaco*, 481 U.S. \_\_\_\_\_, 107 S.Ct. 1519, 95 L.Ed.2d 1, 55 USLW 4457 (1987). See also *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

When the motion for summary judgment was decided, there were no pending state actions, since the zoning appeal was decided in favor of Hollywood Stereo and Video, and the only issue remaining under the damage cause of action was whether Hollywood's constitutional rights were violated and the amount of damages over the nine-month period during which the Respondents were prevented from opening their business. The state court decision did not present the case in a different posture as required by *R. R. Commission v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941).

Since this case does not deal with the details of zoning regulations, no complex state regulating scheme is involved, as in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

### **3. It May Not be Necessary for the Supreme Court to Reach the Constitutional Issues Presented by the Petitioner.**

The Petition for Writ of Certiorari filed by the Borough of Berwick deals only with the due process violation as found by the Third Circuit Court of Appeals when it addressed the case or controversy issue. It does

not address the determination by the Third Circuit that a zoning permit cannot, under the first amendment, be denied because of the subject matter of the material sold or rented in the business.

If the Petition for Certiorari were denied and the district court were to find in favor of the Plaintiff because of violation of its first amendment rights, the Supreme Court would not have to address the constitutional issue with regard to the due process clause, and the Court's principle of avoiding constitutional determinations, unless necessary, could be followed. Furthermore, issues not raised in the Petition cannot be considered by this Court.

**4. The Unusual Procedural Posture of this Case Makes It Inappropriate for the Supreme Court to Grant a Writ of Certiorari.**

Because of the unique procedural posture of this case, it would be inappropriate for the Supreme Court to grant a Writ of Certiorari. The case or controversy issue upon which the Third Circuit decided the case was raised *sua sponte* by the United States District Court for the Middle District of Pennsylvania, without notice to the parties and without the opportunity to develop a factual issue on the question of case or controversy. Because of this unique posture, the record below could not be fully developed, and this Court should not review a case without having a proper record to form the basis for a thorough analysis.

**5. The Case or Controversy Issue is Not Before the Supreme Court Because it was Not Raised in Berwick's Petition for Writ of Certiorari.**

The Borough of Berwick did not raise the case or controversy issue in its Petition for Writ of Certiorari, so it cannot be addressed by the Supreme Court. *F. D. Rich*

*Co. v. United States*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974); *United Brotherhood of Carpenters and Joiners v. N.L.R.B.*, 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed.2d 1186 (1958).

**6. There Exists No Actual Conflict Between the Circuit Courts of Appeal.**

An analysis of the Third Circuit's opinion and the cases relied upon by the Petitioner show that the Third Circuit followed well established principles enunciated by the Supreme Court of the United States and that no actual conflict exists among the circuits. The Third Circuit, in its opinion (Petitioner's Appendix Pg. 4a), specifically found that the Plaintiff's complaint recited a cause of action for violations of Hollywood's rights under the freedom of expression clause of the first amendment and the due process clause of the fourteenth amendment.

The Third Circuit simply stated that the first amendment of the United States Constitution prohibits the denial of a zoning permit because of the content of protected materials rented in a business, and that the due process clause of the fourteenth amendment prohibits the denial of a zoning permit based solely on the subject matter of the materials rented in the business, absent applicable zoning considerations.

This Court, in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), held that there are two elements to an action brought pursuant to 42 U.S.C. 1983: conduct under the color of state law; and deprivation of rights guaranteed by the Constitution of the United States. The Third Circuit, in its opinion (Petitioner's Appendix Pg. 4a), specifically found that the Plaintiff's Complaint recited a cause of action for violations of Hollywood's rights under the freedom of expression clause of the first amendment and the due process clause of the fourteenth amendment.

The Third Circuit's ruling is consistent with the decisions of other circuits when civil rights actions are based upon specific constitutional violations. See: *Griffin v. Burns*, 570 F.2d 1065 (C.A. 1, 1978); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133 (C.A. 2, 1986); probable jurisdiction noted, 477 U.S. 903, 106 S.Ct. 3270, 91 L.Ed.2d 561 (1986), rev'd 481 U.S. \_\_\_\_\_, 107 S.Ct. 1519, 95 L.Ed.2d 1, 55 USLW 4457 (1987); *Burt v. Abel*, 585 F.2d 613 (C.A. 4, 1978); *In Re Selcraig*, 705 F.2d 789 (C.A. 5, 1983); *O'Quinn v. Manuel*, 773 F.2d 605 (C.A. 5, 1985); *Shamie v. City of Pontiac*, 620 F.2d 118 (C.A. 6, 1980); *Colaizzi v. Walker*, 542 F.2d 969 (C.A. 7, 1976), cert. denied, 430 U.S. 960, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977); *New v. City of Minneapolis*, 792 F.2d 724 (C.A. 8, 1986); *Chalmers v. City of Los Angeles*, 762 F.2d 753 (C.A. 9, 1985); *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499 (C.A. 9, 1979); *Mann v. City of Tucson, Dept. of Police*, 782 F.2d 790 (C.A. 9, 1986); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (C.A. 10, 1984), cert. granted and vacated, *City of Lawton, Oklahoma v. Lusby*, 474 U.S. 805, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985), cert. denied, 474 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985); *Vinyard v. King*, 728 F.2d 428 (C.A. 10, 1984); *Rittenhouse v. De Kalb County*, 764 F.2d 1451 (C.A. 11, 1985), reh'g denied, 773 F.2d 1239 (C.A. 11, 1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed.2d 308 (1986). Where a civil rights action is based upon vague proof or allegations of violations of constitutional rights or where the only complaint is a violation of state law, the circuit courts are uniform in refusing to recognize such causes of action under 42 U.S.C. 1983. Where complaints recite specific constitutional violations, the cause of action is recognized, and where the complaints do not recite violations of the federal Constitution the causes of action are not recognized.

The cases relied upon by the Petitioner all deal with circumstances where no finding of a specific constitutional violation was either alleged or found. In *Raskiewicz v. Town of New Boston*, 754 F.2d 38 (C.A. 1, 1985), cert. denied, 474 U.S. 845, 106 S. Ct. 135, 88 L.Ed.2d 111 (1985) the First Circuit recognized that federal courts do not sit as super zoning hearing boards and refused to find a cause of action where there were loose claims of conspiracy and corruption. *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (C.A. 1, 1983) deals with the refusal to issue a permit when all requirements of state law were met. There were no allegations of violation of federal constitutional rights. *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (C.A. 1, 1982), cert. denied, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982) involves speculation as to federal constitutional rights violations. *Alton Land Trust v. Town of Alton*, 745 F.2d 730 (C.A. 1, 1984), another First Circuit case deals, with rights under applicable state law. *Cloutier v. Town of Epping*, 714 F.2d 1184 (C.A. 1, 1983) involved a multi-faceted zoning dispute with no specific allegations or proof of violation of any federal constitutional rights.

*World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079 (C.A. 9, 1987), a Ninth Circuit case, deals solely with an abstention issue where a pending criminal action filed by the state justified abstention. In *Rymer v. Douglas County*, 764 F.2d 796 (C.A. 11, 1985) the Eleventh Circuit refused to find a civil rights cause of action because a building permit was issued on allegedly unsuitable land because of the availability of state remedies and because of the lack of allegations of violations of federal constitutional rights. *Meredith v. Talbot County, Maryland*, 828 F.2d 228 (C.A. 4, 1987), a Fourth Circuit case, deals solely with



abstention, where there were no allegations of federal constitutional rights. Similarly, *Shelton v. City of College Station*, 780 F.2d 475 (C.A. 5, 1986), cert. denied, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1987) found no cause of action alleging a civil rights violation because traffic problems created by a proposed pool hall were a legitimate reason to deny the zoning permit under the applicable zoning ordinance.

The holdings of the Third Circuit Court of Appeals are consistent with these cases when no recitation of federal rights is involved. See *Rogin v. Bensalem Township*, 616 F.2d 680 (C.A. 3, 1980); *Miller & Son Paving Inc. v. Wrightstown Township Civic Association*, mem. 595 F.2d 1213 (C.A. 3, 1979), aff'g. 443 F.Supp. 1268 (E.D. Pa. 1978), cert. denied, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979). The Petitioner argues that the Third Circuit's decision in *Hollywood* is inconsistent with its ruling in *Cohen v. City of Philadelphia*, 736 F.2d 81 (C.A. 3, 1984). To the contrary, *Cohen* is consistent with the Third Circuit's rulings in *Rogin* and *Miller* as well as being consistent with the rule of law established throughout the circuits when no federal constitutional rights violations are alleged. The Fourth Circuit Court of Appeals in *Scott v. Greenville County*, 716 F.2d 1409 (C.A. 4, 1983) reached a similar conclusion to the Third Circuit Court of Appeals in *Hollywood* because the court found sufficient allegations of violations of federal constitutional rights.

The decision of the Third Circuit was in accordance with the decisions of the Supreme Court of the United States, its own precedents, and rulings throughout the circuit courts where specific violations of federal constitutional rights are found. There exists no conflict as asserted by the Petitioner.

7. Any Important Question of Federal Law has Already Been Resolved by the Supreme Court of the United States and Was Followed by the Third Circuit Court of Appeals in the Present Case.

*Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) establishes the requirement of allegations or proof of a deprivation of federal constitutional rights. The federal courts have long had the power to interfere with state administrative boards' decisions for "irrationality or arbitrariness" where there is no legitimate reason for the administrative decision. *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979). See *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). This Court has held that the first amendment protects businesses that deal in protected materials. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *National Association for Advancement of Colored People v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). See, also, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). In *Ginzburg v. United States*, 383 U.S. 463, 474, 86 S.Ct. 942, 16 L.Ed.2d 31, 40 (1966), the Court cited the "frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."

The Petitioner's reliance upon *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) is misplaced. The present case deals with well established definitions of constitutional rights. There is no need to prove that governmental action "shocks the conscience" when well



established constitutional rights have been violated. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) found no liberty or property interests in being free from defamatory remarks. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) deal with liberty interests in being free from the intentional or negligent destruction of property by state officials. The present case deals with well established constitutional rights and state-defined liberty interests.

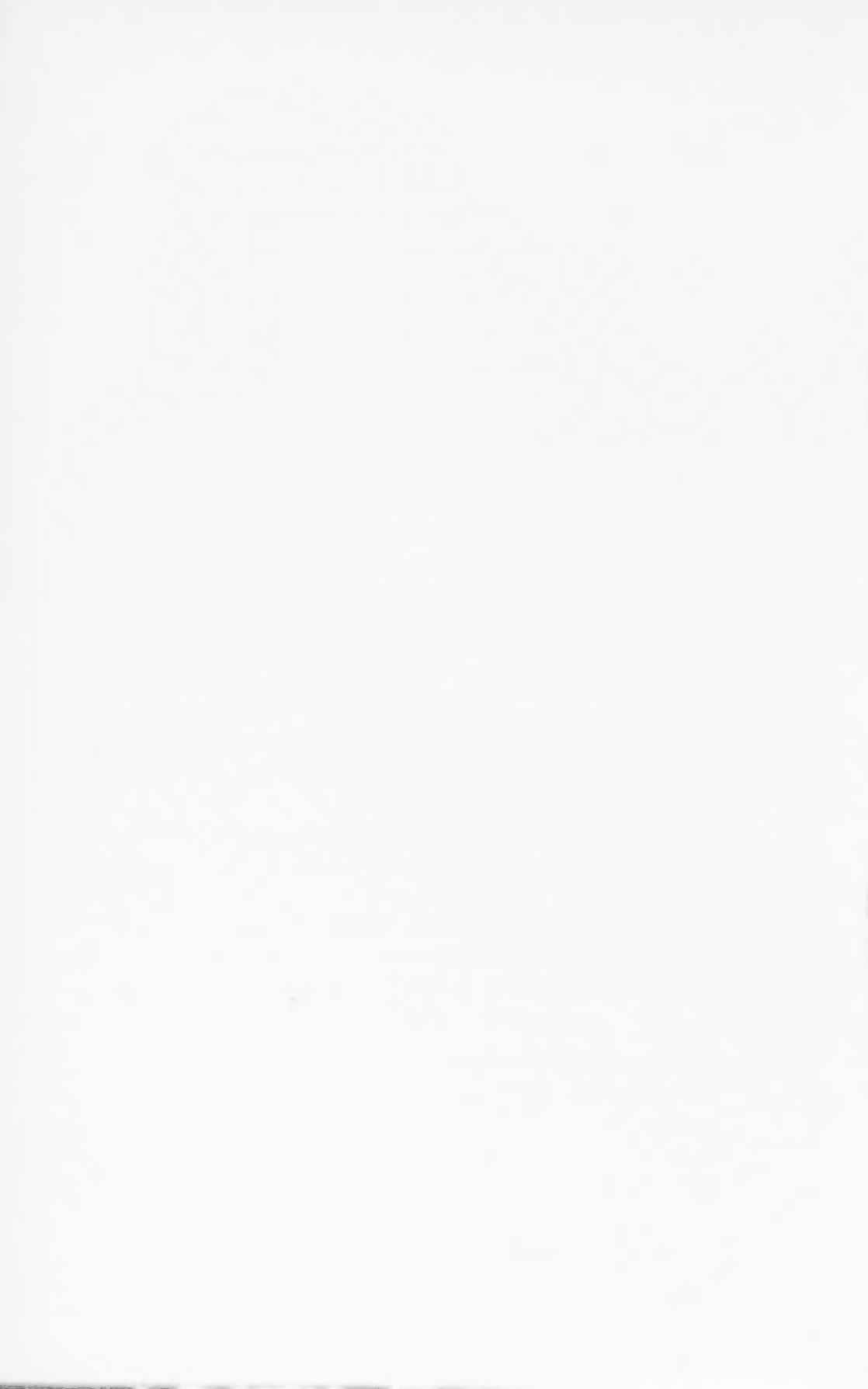
### Conclusion

For these reasons Berwick's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. MIHALIK, ESQ.\*  
ROBERT A. SCHWARTZ, ESQ.  
HUMMEL, JAMES & MIHALIK  
*Attorneys for Respondents*  
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\* *Attorney of Record for Respondents*



**APPENDIX**  
**Transcript of Zoning Hearing Board**  
**ZONING HEARINGS**  
**AUGUST 7, 1986**  
**7:00 P.M.**

**RECEIVED**  
**Aug 27 1986**  
**Borough of Berwick**

**CASE NO. 1—HOLLYWOOD VIDEO & STEREO**

**PREPARED BY: Lisa Marie Orlando**

**CARMEN BUTERA:** This meeting will come to order, Berwick Zoning Hearing, August 7, 1986, 7:00 p.m. In attendance: Carmen Butera, Dan DeFinnis, Thomas Metz, Herman Davidson, Karen Hampton—Codes Officer, Attorney for Council, Attorney Torsella. The first case on our agenda for tonight is the Hollywood Video & Stereo, who is representing them, would you please come up and be sworn in by our Secretary.

**—GREG BROWN SWORN—**

**CARMEN BUTERA:** Would you tell us a little bit of what you do and your application?

**GREG BROWN:** We would like to open a video rental and retail store at 906 Market Street. The business is basically to rent prerecorded movies for home entertainment.

**CARMEN BUTERA:** In these videos that you are going to have, are they going to be rated or just family?

**GREG BROWN:** We carry all types of movies from childrens to adult entertainment.

CARMEN BUTERA: When you say adult, I don't want to sound facetious, is it going to have porno, hardcore?

GREG BROWN: There are X-rated movies, yes.

CARMEN BUTERA: Any questions.

DAN DEFINNIS: You want a pizza parlor with it?

GREG BROWN: Do I want a pizza parlor?

CARMEN BUTERA: NO, NO

GREG BROWN: There was one there.

CARMEN BUTERA: This is at 906 Market Street.

DAN DEFINNIS: Just a video store alone you want?

GREG BROWN: Exactly, right. The adult movies are kept in a private location that noone else can see. People have to be at least 18 years of age to be admitted or to rent that type of movie.

CARMEN BUTERA: Any questions?

THOMAS METZ: What kind of hours?

GREG BROWN: We open every day, except for Sunday, ten in the morning and close at 9:00 at night. Sunday we open at 12 noon and close at seven.

THOMAS METZ: Are you going to have any aluminated signs?

GREG BROWN: Yes, I already purchased it.

CODES OFFICER: It is not aluminated, is it?

GREG BROWN: That will be aluminated, yes on the building, secured.

DAN DEFINNIS: Greg, I want to be honest with you because you are a nice guy and I known you all my life, I am not in favor of the porno that goes with this store.

...DAN DEFINNIS: If you were just selling movies, yes, I would say I want it, my principal is, I don't go for that and I can't deviate from what I believe in, I have nothing against you personally.

GREG BROWN: I understand that.

DAN DEFINNIS: What you are selling, I can't go for it.

GREG BROWN: There is all types of people out there in the world today, some people enjoy this and other don't. Some people enjoy comedy, horror movies, we give the selection for what they want, just as the other video stores do in town.

DAN DEFINNIS: I haven't voted for any other stores. We already had one come in and I voted against it in a residential area. It is not that I am picking on you, but this is my principal. I am not going any further.

HERMAN DAVIDSON: I have a few questions. You just stated that you are going to have a lighted sign on the building?

GREG BROWN: That is correct.

HERMAN DAVIDSON: In the request for a Special Permit, there is no mention of any sign in there.

GREG BROWN: For the Special Exception, I had to apply for that because I did not know when we entered in the lease with ITS that the building was in a residential area. I assumed for the last 30 years, as long as I can remember there has always been commercial activity and then Ms. Hampton came out and told me, after I had purchased the permits for remodeling and for a sign approximately five days to a week after I had purchased the permits, that it was a residential area and that I

should apply for a Special Exception so I came in to apply for a Special Exception to use a commercial business in a residential area.

HERMAN DAVIDSON: When you say a lighted sign, what type of sign do you mean, background lighting, flashing lights?

GREG BROWN: No flashing lights, a soft white light, back and side sign, 2 feet x 5 feet two of them, one on each side of the building.

HERMAN DAVIDSON: Do you have any letters from any neighbors in the area for or against or any thing, or any correspondence from any of the neighbors in the immediate area.

GREG BROWN: No, I don't.

HERMAN DAVIDSON: Is there a church in the area within 2 to 3 blocks?

GREG BROWN: Not to my knowledge.

HERMAN DAVIDSON: Is there a school in the area?

GREG BROWN: The closest school would be Fourteenth Street School.

HERMAN DAVIDSON: I seemed to recall there was a school in there.

CARMEN BUTERA: Four blocks away and there is a church about a block and one-half. School up the street and up on Pine Street, I believe there is a Baptist Church.

GREG BROWN: May I ask why you ask these questions?

HERMAN DAVIDSON: I believe, I am not certain, there may be an Ordinance, you can't if you are within so many feet of a church or school.

GREG BROWN: You can't what?

HERMAN DAVIDSON: You can't put this type of business in there.

GREG BROWN: This is not a video gameroom business.

HERMAN DAVIDSON: I realize what it is, I understand. Did anybody point out to you the standards for a Special Exception?

CODES OFFICER: He is asking if I did.

GREG BROWN: No she didn't.

HERMAN DAVIDSON: In the Zoning Ordinance it specifically states what Special Exception can be granted in a residential zone and I believe this is a R-2 zone and in the criteria, if anybody wants to look at it, it is 100-16 B, that criteria is all we can base our decision on these terms and exactly what we can allow in the area. I would suggest that somebody maybe should have explained in a little more detail.

GREG BROWN: May I ask when this was written?

HERMAN DAVIDSON: 1969 I believe.

GREG BROWN: Probably at that particular time, they did not have prerecorded movies. We are asking for a Special Exception, maybe it should be given consideration.

HERMAN DAVIDSON: Oh it will be given consideration. All I am saying is that the Special Exceptions listed here that we can allow, do not allow for retail sales for a R-2 area. I don't care what kind of business it is, I am saying retail sales or commercial business are not allowed in a R-2 area, according to what is listed under Special Exception and Permitted Uses.

J. TORSELLA: The area that you propose to occupy is that consisted of 28 feet x 35 feet?

GREG BROWN: Yes.

J. TORSELLA: Does the lease agreement have provision for parking?

GREG BROWN: Yes, as far as parking, the entire area off to the side, a good 75 feet by 200 feet is permissible for us to use for our customers to park.

J. TORSELLA: To the south of the building?

GREG BROWN: Yes.

J. TORSELLA: Offstreet parking?

GREG BROWN: Yes.

J. TORSELLA: Are you familiar with what business was in the building prior to your proposed use?

GREG BROWN: Yes, previous to us was a pizza parlor.

JOSEPH F. TORSELLA: When did that close?

GREG BROWN: Approximately four weeks ago, a little longer, more like six to eight week ago.

JOSEPH F. TORSELLA: Is there water, sewage, fire and police protection there?

GREG BROWN: Yes.

JOSEPH F. TORSELLA: Your application for a Special Exception, did you prepare the application?

GREG BROWN: Yes I did.

JOSEPH F. TORSELLA: In Number 2 of the application—movie rentals for family entertainment, is that correct?

GREG BROWN: Yes.



JOSEPH F. TORSELLA: That did not indicate you proposed to have adult movies and other adult family entertainment?

GREG BROWN: Yes.

JOSEPH F. TORSELLA: You indicated you have a sign permit, when did you bring the permit application?

GREG BROWN: I don't have the permit with me as far as the exact date, about six weeks ago.

JOSEPH F. TORSELLA: When you presented that application for permit, did that show that there would be aluminations on the sign.

GREG BROWN: No that didn't come up, I didn't know there was a difference, whether it be aluminated, or it wasn't. I just assumed, again the business that is attached right to it is the Food Bag, plenty of aluminated lights there. I just assumed that it was a commercial area and it would be permissible to do it as I stated before that Ms. Hampton approached me that it was a residential area, so we immediately filled out application for Special Exception.

CARMEN BUTERA: I would like to ask you a question. Do you think the X-rated movies versus the family, what do you think the percentage of business it would bring you.

GREG BROWN: Biggest percentage of business would be the childrens and the normal movies, approximately 10 to 15 percent would be the other portion.

CARMEN BUTERA: Do you think the loss of that ten percent would create a financial hardship that would make this venture impractical?

GREG BROWN: It would definitely make a difference in the amount of business we do, yes.

CARMEN BUTERA: Would it alter your future of entering into the business or not?

GREG BROWN: I would like to discuss that with my partner, but personally, I think it would, yes.

CARMEN BUTERA: Any other questions?

DAN DEFINNIS: I would definitely be in favor if it is strictly eliminated, I would be in favor.

CODES OFFICER: Mr. Brown did in fact come in for a building permit at the time I issued the permit.

J. F. TORSELLA: If you are going to testify, you must be sworn.

CARMEN BUTERA: Did you wish to table this until you found out whether there is an Ordinance restricting this type of business in the confines of the church or the school?

J. F. TORSELLA: Before you move to table, Ms. Hampton wants to testify.

—KAREN HAMPTON SWORN—

J. F. TORSELLA: Or if anybody else wants to testify.

CODES OFFICER: Mr. Brown had workers out working at his building and I drove by one day and I saw they didn't have a building permit, so I stopped and the gentlemen in there were kind enough to call Mr. Brown and tell him he needed a building permit. At the time I issued the building permit, sign permit, I just assumed that the steps had already been taken that that was a commercial area and it was only when I got back to my office and checked is when I realized that it was residential. I did approach him about it and I said it was not a commercial, with a nonconforming structure and I am the one that advised him that according to 165-85

you can in fact grant Special Exception for a change of use and that is why he is here. The bit about no I did not explain to him any guidelines, I just assumed, and maybe I should just stop assuming and consult Mr. Davidson more that we are just changing use, because we had in this Borough for quite awhile, where people just automatically keep going into different locations and keep changing and we never caught up with it and now we are going to catch up with it, as public record that in fact is our nonconforming use and every time they want to change them, they have to come in for a Special Exception for a change of use.

CARMEN BUTERA: The change of use Mr. Brown, would not hinder my opinion, but having the porno movies, I have to worry whether it would offend the town people, so we would like to check to see whether there is indeed a restriction how far away from church and school and then give you the findings.

DAN DEFINNIS: I think we could come to a decision tonight. I'll tell you why. About six months ago we had a meeting here and they gave a permit for an video like he is running near the calvery church, I didn't vote for it, of course, but they were given it the same night, with the other guys on the Board before you two guys came, or three, they were given that permit to go in, less than one-half block near the church. Same block. I don't think there is any reason to delay and postpone thinking because we done to much of that, we have had four or five hearings that we tabled and they are back again, I think we should be man enough to stand up for our convictions, if you have any, if you don't, vote accordingly.

CARMEN BUTERA: It is not that we don't have our convictions, but we would like to give our applicant every opportunity to present their position.

DAN DEFINNIS: Definitely, I think we have.

CARMEN BUTERA: I cannot act unless there are motions on the floor.

DAN DEFINNIS: Make motion that we deny request.

J. TORSELLA: No . . .

DAN DEFINNIS: Now look Joe, you are not our attorney, you are the Borough's attorney, not ours, you are not our attorney but we will get one.

CARMEN BUTERA: He protects Council.

DAN DEFINNIS: If Council has to pressure us into everything that we do, if it is good or bad.

CARMEN BUTERA: You have to make findings of fact first, and then you could make your motion. He is not telling you otherwise. Make your findings of fact Dan and if you want to pursue that motion, that is your preference. Attorney Torsella has been telling you this for six months.

DAN DEFINNIS: I made a motion, we don't need any more findings of facts, you guys know better than that, where are you Herman, you are the one always looking for facts, don't you have any now?

HERMAN DAVIDSON: Motion was made was there any second?

CARMEN BUTERA: No second. Motion dies.

HERMAN DAVIDSON: Mr. Chairman, I have a question with an interpretation of one of our Ordinances here. Maybe you can straighten me out on it. It is on 100-95 B 3. This is the application of extent of use regulations. If I interpret this paragraph correctly, it states that we are limited to what is listed under

permitted and special uses. If my interpretation is correct, if you agree that this interpretation is correct, then I would make some findings of fact.

CARMEN BUTERA: Make your findings of fact.

HERMAN DAVIDSON: Motion for finding of fact that under Paragraph 100-11 B subparagraphs (1) through (8), that no where within these paragraphs is there any indication that any sort of commercial sales can be allowed under this Special Exception.

CARMEN BUTERA: Motion on the floor. Do I hear a second. I will second that.

Questions?

All in favor signify by saying Aye: Herman Davidson, Tom Metz, Carmen Butera

Obstained: Dan DeFinnis.

HERMAN DAVIDSON: Make a motion for finding of fact under Paragraph 100-16 B (1) through (7) and within the subparagraph there are no indications of an allowance of a commercial business or movie-type business allowed within this area.

CARMEN BUTERA: SECOND? I'll second that.

Questions?

All in favor signify by saying aye: Herman Davidson, Tom Metz, Carmen Butera

DAN DEFINNIS: Obstained.

HERMAN DAVIDSON: Motion that we deny the application of Hollywood Video and Stereo for their Special Permit at 906 Market Street.

CARMEN BUTERA: Second.

Questions?

All in favor signify by saying Aye. Herman Davidson, Tom Metz, Carmen Butera, Dan DeFinnis.

CARMEN BUTERA: Mr. Brown, Our Codes Officer will be sending you a letter indicating that your application has been denied.

GREG BROWN: Would it be considered if we decided not to have the X-rated movies?

CARMEN BUTERA: Oh yes, of course, I can't comment on that at this position.

**Stipulation of Settlement**

IN THE COURT OF COMMON PLEAS  
OF THE 26TH JUDICIAL DISTRICT  
COLUMBIA COUNTY BRANCH, PA.

CIVIL DIVISION

ZONING APPEAL

---

GLEN M. NEIDERHISER and GREGORY C. BROWN,  
t/a PROGRESSIVE ENTERPRISES, t/a  
HOLLYWOOD STEREO AND VIDEO,

*Appellant,*

vs.

THE ZONING HEARING BOARD OF  
THE BOROUGH OF BERWICK,

*Appellee.*

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No. 906 of 1986

---

**STIPULATION OF SETTLEMENT**

1. On or about July 25, 1986, Progressive Enterprises, t/a Hollywood Stereo and Video, filed an application with the Zoning Hearing Board of the Borough of Berwick to convert a Pizza Parlor, situate at 906 Market Street, Berwick, Penna. to rentals of video tapes, films and equipment.

2. On or about August 7, 1986, after hearing before the Zoning Hearing Board of the Borough of Berwick, the application of the Appellant was denied.

3. On or about August 20, 1986, the Appellant filed this Appeal to the decision of the Zoning Hearing Board of the Borough of Berwick.

4. The parties hereto have reached an agreement on resolution of the issues and sign this Stipulation to end and terminate all litigation relating to the application before the Zoning Hearing Board and the ruling by the Zoning Hearing Board, and the Appeal filed hereof.

5. The Applicant shall be permitted to conduct the business of Hollywood Stereo and Video Retail Sale and Rentals at the premises situate at 906 Market Street, which was formerly occupied as a Pizza Parlor and Luncheon Room.

6. The Applicant shall not place any signs or lighting on the premises which do not conform to the Borough of Berwick Zoning Ordinance.

7. Appellant, Progressive Enterprises t/d/b/a Hollywood Stereo and Video, before operation of any signs on the premises will file application with the Zoning Hearing Board pursuant to provisions of Section 165-72 of the Borough of Berwick Zoning Ordinance.

8. The Appellant shall comply with the Borough of Berwick Ordinance No. 1158 with respect to pornography and will not operate and maintain the premises as an Adult Book Shop or Adult Film Viewing Premises.

9. Each party will pay its own separate cost.

10. Upon signing of this Stipulation by the Attorneys and approval by the parties, the parties consent to the Court entry of an Order authorizing Progressive Enterprises t/d/b/a Hollywood Stereo and Video, Inc. to



operate a retail stereo and video rental and sale shop at 906 Market Street in the Borough of Berwick under terms and conditions set forth herein.

JOSEPH F. TORSELLA, ESQ., on  
behalf of the Zoning Hearing Board of  
the Borough of Berwick, Appellee

JOHN MIHALIK, ESQ., on behalf  
of Glen M. Neiderhiser and  
Gregory C. Brown, t/a  
Progressive Enterprises, t/a  
Hollywood Stereo and  
Video, Appellant

CARMEN BUTERA, Chairman Zoning  
Hearing Board of the  
Borough of Berwick

GLEN M. NEIDERHISER

GREGORY C. BROWN

**Complaint Filed in U.S. District Court  
IN THE UNITED STATES DISTRICT COURT  
IN THE MIDDLE DISTRICT  
OF PENNSYLVANIA**

---

**GLEN M. NEIDERHISER and GREGORY C. BROWN,  
t/a PROGRESSIVE ENTERPRISES, t/a  
HOLLYWOOD STEREO AND VIDEO,**  
*Plaintiff,*

**vs.**

**THE BOROUGH OF BERWICK; DANIEL  
DEFINNIS, SR.; THOMAS METZ; CARMEN  
BUTERA; and HERMAN DAVIDSON, members of  
the Zoning Hearing Board of the Borough of Berwick,**  
*Defendant.*

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Civil No. \_\_\_\_\_

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**COMPLAINT**

The Plaintiffs by their Attorney John A. Mihalik, Esq. of HUMMEL, JAMES & MIHALIK file this Complaint against the Defendant upon causes of action whereof the following is a statement:

**INTRODUCTORY STATEMENT**

1. The Plaintiffs file this civil rights action against the Borough of Berwick and the individual members of its Zoning Hearing Board because of their refusal to

grant a special exception to the Plaintiffs because their videotape business sells a certain number of x-rated movies and because of the attempt by the Borough to impose upon the Plaintiffs an unconstitutional ordinance purporting to regulate adult book stores.

### *JURISDICTIONAL STATEMENT*

2. This Court has jurisdiction of this matter by reason of 28 U.S.C. 1331 in that it is an action brought pursuant to a federal statute 42 U.S.C. 1983. The Plaintiffs also appeal to the Courts general equity jurisdiction and seek relief under the Declaratory Judgment Act 28 U.S.C. 2201.

### *PARTIES*

3. The Plaintiffs are individuals engaged in the business of owning videotape rental stores and their principle place of business is located at 1001 Old Berwick Road, Bloomsburg, Columbia County, Pennsylvania.

4. The Defendant, the Borough of Berwick is a municipal corporation organized and existing under the laws of the Commonwealth of Pennsylvania having its corporate offices at Borough Hall, Market Street, Berwick, Columbia County, Pennsylvania.

5. Daniel DeFinnis, Sr. is an adult individual residing at 206 East Second Street, Berwick, Pennsylvania and is a member of the Zoning Hearing Board of the Borough of Berwick.

6. Thomas Metz is an adult individual residing at 1641 Fairview Ave., Berwick, Pennsylvania and is a member of the Zoning Hearing Board of the Borough of Berwick.

7. Carmen Butera is an adult individual residing at 370 Monroe Street, Berwick, Pennsylvania and is a member of the Zoning Hearing Board of the Borough of Berwick.

8. Herman Davidson is an adult individual residing at 1132 Orange Street, Berwick, Pennsylvania and is a member of the Zoning Hearing Board of the Borough of Berwick.

### *FACTUAL ALLEGATIONS*

9. The Plaintiffs entered into a lease dated June 30, 1986 to rent premises located at 906 Market Street, Berwick, Pennsylvania for use as a store to sell videotapes, video equipment and related supplies.

10. The property is commercial in nature and had been used prior to the enactment of the zoning ordinance of the Borough of Berwick for various commercial uses and has pre-existing nonconforming status under the applicable law of the Commonwealth of Pennsylvania and the Zoning Ordinance of the Borough of Berwick.

11. On July 25, 1986 the Plaintiffs applied for a special exception to change the use of the premises from one nonconforming use to another nonconforming use and on August 13, 1986, the Zoning Hearing Board of the Borough of Berwick and the individual Defendants named above denied the request for special exception.

12. The Plaintiffs' application met all requirements of the law of the Commonwealth of Pennsylvania and of the Zoning Ordinance of the Borough of Berwick and the application was denied because a portion of the videotape rentals involved x-rated movies.

13. The actions of the individual Defendants were in the furtherance of the stated policy of the Borough of Berwick and it is further alleged that the Borough of Berwick had the opportunity to correct the constitutional violations alleged herein but adopted and ratified the decision of the members of the Zoning Hearing Board.

14. In addition, the Borough of Berwick has indicated its intent to impose upon the Plaintiff the provisions of Borough of Berwick Ordinance No. 1158 regulating adult book shops or adult film viewing premises.

### *DAMAGES*

15. As a result of the refusal of the Defendants to grant the Plaintiff the special exception, the Plaintiffs have suffered the following damages in excess of \$10,000.00.

A. Attorney's fees to secure the special exception in the Courts of the Commonwealth of Pennsylvania.

B. Lost profits from September 1, 1986 through the eventual issuance of the Special Exception and Zoning Permit.

C. Costs related to the rental of the structure prior to the eventual granting of the special exception.

### *COUNT I*

*ADULT BOOK STORE ORDINANCE NO. 1158*

*FREEDOM OF SPEECH/DUE PROCESS*

GLEN M. NEIDERHISER and  
GREGORY C. BROWN, t/a  
PROGRESSIVE ENTERPRISES, t/a  
HOLLYWOOD STEREO AND VIDEO

VS.

THE BOROUGH OF BERWICK

16. Ordinance No. 1158 violates the Plaintiffs' right to Freedom of Expression under the First and Fourteenth amendments of the United States Constitution and violates their right to Substantive Due Process because the ordinance is unconstitutionally vague; serves no legitimate governmental purpose and has no rational basis.

WHEREFORE, the Plaintiff requests the following relief:

- A. Monetary damages in excess of \$10,000.00
- B. Declaratory Judgment against the Defendant the Borough of Berwick declaring ordinance No. 1158 unconstitutional.
- C. That an injunction be issued enjoining the enforcement of said ordinance.
- D. Attorney fees and costs.
- E. Such other relief which is just and reasonable.

*ADULT BOOK STORE ORDINANCE NO. 1158*

*EQUAL PROTECTION*

GLEN M. NEIDERHISER and  
GREGORY C. BROWN, t/a  
PROGRESSIVE ENTERPRISES, t/a  
HOLLYWOOD STEREO AND VIDEO

VS.

THE BOROUGH OF BERWICK

17. It is alleged that there are other locations in the Borough of Berwick that sell x-rated material and said ordinance has not been enforced nor applied against such other locations.

18. Accordingly, the Plaintiffs have been denied Equal Protection of Law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, the Plaintiff requests the following relief:

- A. Monetary damages in excess of \$10,000.
- B. That an injunction be issued enjoining the enforcement of said ordinance.
- C. Attorney's fees and costs.
- D. Such other relief which is just and reasonable.

GLEN M. NEIDERHISER and  
GREGORY C. BROWN, t/a  
PROGRESSIVE ENTERPRISES, t/a  
HOLLYWOOD STEREO AND VIDEO

VS.

THE BOROUGH OF BERWICK; DANIEL  
DEFINNIS, SR.; THOMAS METZ; CARMEN  
BUTERA; and HERMAN DAVIDSON

19. It is alleged that the individual Defendants by denying the Plaintiff's request for special exception and the adoption of said decision by the Defendant, the Borough of Berwick has deprived the Plaintiffs' of Freedom of Expression as guaranteed by the First and Fourteenth Amendments of the United States Constitution.



WHEREFORE, the Plaintiffs request the following:

A. Monetary damages in excess of \$10,000.

B. That the Defendant be directed to issue to the Plaintiff a special exception and zoning permit permitting the change of use from one pre-existing nonconforming use to another.

C. An award of attorney's fees and costs.

JOHN A. MIHALIK, ESQUIRE

